No. 14793

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CHARLES A. RYNO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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the endorsement to be forged. The District Court had jurisdiction of the cause under Section 3231 of Title 28, United States Code, which confers on the District Court's original jurisdiction "of all offenses against the laws of the United States."

The defendant pleaded guilty to both counts and, on March 23, 24 and 25, 1955, a Court trial was had upon the above indictment, the Honorable Ernest A. Tolin, Judge Presiding. On April 18, 1955, a Memorandum of Decision was filed finding the defendant guilty as charged. On said date a Judgment and Commitment was also filed sentencing the defendant to nine months on each count, sentences to run consecutively.

Subsequently, on April 25, 1955, a notice of appeal to this Honorable Court was filed and the United States District Court granted appellant an order to proceed on appeal in *forma pauperis*. Thereafter, a statement of points and authorities and a designation of record were filed and an order was made by this Court, pursuant to application of the appellant, granting leave to prosecute the appeal upon a typewritten record.

This Court has jurisdiction under the provisions of Title 28, United States Code, Section 1291.

II.
THE STATUTE INVOLVED.

The indictment was brought under Section 495 of Title 18, United States Code, which provides in pertinent part as follows:

> "Whoever falsely . . . forges, . . . any . . . contract, or other writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States or any officers or agents thereof, any sum of money; or
>
> "Whoever utters or publishes as true any such . . . forged . . . writing, with intent to defraud the United States, knowing the same to be . . . forged . . .
>
> "Shall be fined not more than $1,000 or imprisoned not more than ten years, or both."

In this case the allotment check which is set forth in the indictment was issued under the provisions of Public Law 771, 81st Congress [Rep. Tr. p. 4], Title 50, App., Secs. 2201 to 2216 and Title 36, Secs. 231, *et seq.,* and Regulations issued by the Secretary of the Air Force thereunder. These regulations are contained in the Air Force Manual and those particularly relating to Class "Q" allotments were received in evidence as Government's Exhibit 23 without objection by the appellant. [Rep. Tr. pp. 121, 122.] Because of the length of the Code Sections and the Regulations, they will not be quoted verbatim in this part of the appellee's brief but the pertinent sections will be set forth hereafter in the argument.

III.
ARGUMENT.

A. The District Court Properly Allowed Appellant's Legal Wife to Testify Against Him as a Witness for the United States.

The Government respectfully submits that the District Court did not err in denying appellant's motion to strike the testimony of Hazel R. Ryno and that the following authorities fully support that position as a matter of law.

The District Court below held in *United States v. Ryno,* 130 F. Supp. 685, at p. 688 that "upon the trial of a defendant accused of forgery of a check by signing the name of another thereto, the prosecution must prove that the defendant was not authorized to sign such name, and until this proof is made, it is not shown to be a false instrument, and the defendant is not put to his proof at all."[3]

At the trial the Government offered evidence to prove that the defendant Charles A. Ryno forged the name of the payee on the check set forth in the indictment and thereafter cashed it without the consent of said payee. The direct testimony of his wife, Hazel R. Ryno, to whose order the check was drawn, was offered and admitted by the Court over the objection of the defendant. However, additional evidence independent of the wife's testimony, was also received which it is submitted was sufficient alone to establish the absence of any express authorization for the above action. This latter contention urged by the Government, as well as the appellant's proposition that, at any event, the defendant had "authority by opera-

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[3]*People v. Lundin,* 117 Cal. 124, 48 Pac. 1024.

tion of law" to endorse and cash the check without committing any offense, will be discussed herein after the subject of privilege has been considered.

Curiously enough, although the privilege claimed in this case has been dealt with extensively, counsel for the parties to this proceeding have been able to find scant authority relating it to the precise facts in this proceeding. The one case which has been found dealing with federal law and which involves a forgery is distinguished herein because of the facts involved. However, there is an abundance of language in the cases cited which we believe is more than adequate to demonstrate the present proper application of the law to our facts as a result of an obvious progression over the years, particularly since 1935, in the thinking of the courts on this subject. There are several excellent discussions of the rule of privilege preventing one spouse from testifying against the other, together with its exceptions, in the cases, which, of course, are not set forth entirely in this brief. However, pertinent portions thereof are contained herein which it is believed accurately reflect the trend of the law and its contemporary status. None of the quotations, it is felt, have been changed in meaning by being taken out of context and they emphasize rather than detract from the gist of the opinions. They are all set forth for the convenience of the Court in having at hand in one document what appears to this writer to be particularly apt and relevant language from many of the cases.

Over the past 20 years the application of the common law rule mentioned above has understandably changed and expanded in the light of constantly developing standards of wisdom and justice. Mr. Justice Sutherland in

the case of *Funk v. United States,* 290 U. S. 371, phrased it in this fashion, at page 381:

> "The fundamental basis upon which all rules of evidence must rest—if they are to rest upon reason —is their adaptation to the successful development of the truth. And, since experience is of all teachers the most dependable, and since experience is also a continuous process, it follows that a rule of evidence at one time thought necessary to the ascertainment of truth, should yield to the experience of a succeeding generation whenever that experience has clearly demonstrated the fallacy or unwisdom of the old rule."

Thus, it is felt that a brief review of the authorities during the past few decades should be most helpful in determining whether the District Court properly admitted the testimony of Hazel R. Ryno "in the light of reason and experience," as set forth in Rule 26 of the Federal Rules of Criminal Procedure.

As early as January 7, 1918, in *Rosen v. United States,* 245 U. S. 467, we find the Supreme Court of the United States stating the "modern" rule of 37 years ago relating the competency of witnesses convicted of crime. A co-defendant had pleaded guilty of forgery and was afterwards called as a witness for the Government. An objection was made by the defendant on trial that the witness was not competent to testify as he had previously pleaded guilty in a state court to the crime of forgery and had served his sentence. The Court held the witness competent, "Satisfied as we are that the legislation and the very great weight of judicial authority which have developed in support of this modern rule, especially as applied to the competency of witnesses convicted of crime,

proceed upon sound principle. We conclude that the *dead hand of the common law rule* of 1789 should no longer be applied to such cases as we have here, * * *" (Emphasis added.) Previously on pages 470 and 471, the Court gave its reasons for the holding:

> "Accepting as we do the authority of the later, the *Benson Case,* rather than that of the earlier decision, we shall dispose of the first question in this case, 'in the light of general authority and sound reason.'
>
> "In the almost twenty years which have elapsed since the decision of the *Benson Case,* the *disposition of courts and of legislative bodies to remove disabilities from witnesses has continued,* as that decision shows it had been going forward before, under dominance of the conviction of our time that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, *leaving the credit and weight of such testimony to be determined by the jury or by the court rather than by rejecting witnesses as incompetent,* with the result that this principle has come to be widely, almost universally, accepted in this country and in Great Britain." (Emphasis added.)

While the *Rosen* case obviously did not involve the same privilege claimed in this case with the respect to the competency of the witness, the language used is clearly pertinent since it shows the disposition of the Supreme Court of the United States even at that early date to remove disabilities from witnesses rather than to exclude their testimony. In fact, on page 470, the Court in discussing *Benson v. United States,* 146 U. S. 325, decided

in 1892, noted that that case pointed out a great change had taken place even in the preceding 50 years, that is, since 1842, in the disposition of the courts to hear witnesses rather than to prevent them from testifying.

On December 11, 1933, 15 years later, an important step in this phase of the law was taken in the case of *Funk v. United States, supra,* 290 U. S. 365. Again, the precise issue was not identical with the question in the instant matter, but the expressions of the Court in this opinion are most revealing of the continuing changes of the application of the rules of privilege relating specifically to husband and wife.

The sole inquiry in the *Funk* case was whether in the United States District Court the wife of a defendant in a criminal case could be a competent witness *in his behalf.* The opinion held that the wife was not an incompetent witness for the defendant. On page 376, the Supreme Court again quoted with approval from the earlier *Benson* case, *supra,* as follows:

> "But the last fifty years have wrought a great change in these respects, and to-day the tendency is to enlarge the domain of competency and to submit to the jury for their consideration as to the credibility of the witness those matters which heretofore were rules sufficient to justify his exclusion. This change has been wrought partially by legislation and partially by judicial construction. * * *
>
> "Legislation of similar import prevails in most of the States. The spirit of this legislation has controlled the decisions of the courts, and steadily, one by one, the merely technical barriers which excluded witnesses from the stand have been removed, till now it is generally, though perhaps not universally, true that no one is excluded therefrom unless the lips of

the originally adverse party are closed by death, or unless some one of those peculiarly confidential relations, like that of husband and wife, forbids the breaking of silence."

On page 377, the Court quoted from the *Rosen* case, *supra*, which is set forth above and which case was tried 25 years after the *Benson* matter. On page 379, the Court stated as follows:

"With the conclusion that the controlling rule is that of the common law, the *Benson* case and the *Rosen* case do not conflict; but both cases reject the notion, which the two earlier ones seem to accept, that the courts in the face of greatly changed conditions, are still chained to the ancient formulae and are powerless to declare and enforce modifications deemed to have been wrought in the common law itself by force of these changed conditions."

On page 380, the Court went on to say:

"The conclusion which the court reached was based not upon any definite act of legislation, but upon the trend of congressional opinion and of legislation (that is to say of legislation generally), and upon the *great weight of judicial authority* which, since the earlier decisions, had developed in support of a more modern rule. In both cases the court necessarily proceeded upon the theory that the resultant modification which these important considerations had wrought in the rules of the old common law *was within the power of the courts to declare and make operative.* (Emphasis added.)

* * * * * * * *

"The rules of the common law which disqualified as witnesses persons having an interest, long since, in the main, have been abolished both in England and

in this country; and what was once regarded as a sufficient ground for excluding the testimony of such persons altogether has come to be uniformly and more sensibly regarded as affecting the credit of the witness only. Whatever was the danger that an interested witness would not speak the truth—and the danger never was as great as claimed—its effect has been minimized almost to the vanishing point by the test of cross-examination, the increased intelligence of jurors, and perhaps other circumstances. The modern rule which has removed the disqualification from persons accused of crime gradually came into force after the middle of the last century, and is today universally accepted. The exclusion of the husband or wife is said by this court to be based upon his or her interest in the event. *Jin Fuey Moy v. United States, supra.* And whether by this is meant a practical interest in the result of the prosecution or merely a sentimental interest because of the marital relationship, makes little difference. In either case, a refusal to permit the wife upon the ground of interest to testify in behalf of her husband, while permitting him, who has the greater interest, to testify for himself, presents a manifest incongruity.

"Nor can the exclusion of the wife's testimony, in the face of the broad and liberal extension of the rules in respect of the competency of witnesses generally, be any longer justified, if it ever was justified, on any ground of public policy. *It has been said that to admit such testimony is against public policy because it would endanger the harmony and confidence of marital relations, and, moreover, would subject the witness to the temptation to commit perjury. Modern legislation, in making either spouse competent to testify in behalf of the other in criminal cases, has definitely rejected these notions,* and in the

light of such legislation and of modern thought they seem to be altogether fanciful. The public policy of one generation may not, under changed conditions, be the public policy of another. *Patton v. United States,* 281 U. S. 276, 306. (Emphasis added.)

* * * * * * * *

"It may be said that the court should continue to enforce the old rule, however contrary to modern experience and thought, and however opposed, in principle, to the general current of legislation and of judicial opinion, it may have become, leaving to Congress the responsibility of changing it. Of course, Congress has that power; but *if Congress fails to act,* as it has failed in respect of the matter now under review; and the court be called upon to decide the question, *is it not the duty of the court, if it possess the power, to decide it in accordance with present day standards of wisdom and justice rather than in accordance with some outworn and antiquated rule of the past?* That this court has the power to do so is necessarily implicit in the opinions delivered in deciding the *Benson* and *Rosen* cases. (Emphasis added.)

* * * * * * * *

"To concede this capacity for growth and change in the common law by drawing 'its inspiration from every fountain of justice,' and at the same time to say that the courts of this country are forever bound to perpetuate such of its rules as, by every reasonable test, are found to be neither wise nor just, because we have once adopted them as suited to our situation and institutions at a particular time, is to deny to the common law in the place of its adoption a 'flexibility and capacity for growth and adaptation' which was 'the peculiar boast and excellence' of the system in the place of its origin." (Emphasis added.)

Two years later on December 9, 1935, the Tenth Circuit in *Yoder v. United States,* 80 F. 2d 665, handed down a decision which the Government urges is persuasive authority for its position although the charge was dissimilar and the basis of the decision was thought to be dictum by the court in *United States v. Walker, infra,* 176 F. 2d 564 at page 568. The appellant was convicted of transporting a female in interstate commerce for immoral purposes. The prosecuting witness testified that she and the defendant drove to Chicago together and the defendant testified that they both talked to his lawful wife about the trip before leaving. In rebuttal, the Government called his wife, who divorced him after the above trip and before the trial. She testified she was not home on the day of the alleged conversation and had never met the prosecuting witness. The Court of Appeals held this testimony was rightly admitted. After a review of the competency of witnesses "from the dawn of common law," it was stated at page 668:

> "These statutes, and the decisions of many courts which might be cited, indicate a *clear and decided trend toward removing the bar of incompetency from witnesses as such;* that we are moving steadily in the direction of allowing the trier of the facts to hear all the evidence, the interest or relationship of the witness to the parties being given due consideration in weighing its value. *The trend is in the right direction,* for we can see no reason why Mrs. Yoder should not testify that she was in Seminole, and not Shawnee, on a certain day, and that she did not know Mrs. Young; nor can we see any reason why Yoder, who testified to the contrary, should have the privilege of excluding her testimony." (Emphasis added.)

It is interesting to note that the holding in this case was based upon the trend toward removing the bar of incompetency altogether and not upon the ground that the divorce had made testimony admissible. (So stated Justice Clark in *United States v. Mitchell,* 137 F. 2d 1006, at page 1009—"Judge McDermott rested the Court's decision on the broader ground of the wife's competency.")

A few months before the *Yoder* decision, the case of *Paul v. United States* was decided in the Third Circuit on September 20, 1953, at 79 F. 2d 561. It involved a charge of forgery of a Government check and the defendant contended on appeal that the husband should not have been allowed to testify against his wife, a defendant. The Court made the flat statement that the common law rule had not been relaxed as to permit a husband to testify against his wife, and that was the extent of the holding. There was no discussion as to whether or not the particular facts were within the exception of a crime against the property of a spouse which is recognized by some authorities. On that basis it appears that it would be easily distinguishable on the facts from the present case. In the *Paul* matter, the witness Reed was not the victim of a crime against his property or person. The Court in its discussions of the evidence on page 563 stated that the jury had found neither of the defendants had forged the check and that under the circumstances the only one who could have placed his endorsement thereon was the witness—husband, Reed.

The defendant wife and Reed had lived separately since 1927 and in that year he had applied the entire amount of a first loan of $296.00 against a United States Navy bonus to reduce support arrearages. Later in 1932, a

further support order was made in her favor against him and contempt proceedings had begun but were adjourned on the condition that Reed secure a second bonus loan and liquidate the balance due. Accordingly, he had received a second loan of $472.72. At his instance, the check had been sent to his wife at her address so that she could see that it had been actually issued. She sent it back to him and it was returned to her with his purported endorsement on it. The question was whether or not the endorsement was forged. Not only had the arrangements been made to give her the check because of the pending contempt proceedings but the Court stated at page 563:

> "Further, Mrs. Reed had the unendorsed check and sent it to her husband for endorsement. What reason could there have been for him to return it to her unendorsed? * * * All the evidence in the case and every reasonable inference to be drawn from the evidence indicate that Reed himself endorsed this check, just as he did the former check for $296.00 in order to apply it to the order for the support of his wife and son, as he had promised to do, so as to prevent further contempt proceedings. * * *"

In other words, it very much appears that the facts do not support a case within the recognized exception that the spouse may testify where a crime has been committed against his or her property.

In *Bruner v. United States,* 158 F. 2d 281, a case from the Sixth Circuit on June 1, 1948, the question of the competency of a wife to testify against her husband was again raised. The Court set forth the common law rule and only seems to recognize the exception relating to personal injuries. Noting the *Paul* and *Yoder* cases as

conflicting, the Court based its decision of the incompetency of the witness on *United States v. Graves,* 150 U. S. 118, decided on November 6, 1893. However, it is again clear that in both the *Bruner* and *Graves* cases the wives were not victims who had suffered any injuries whatsoever, personal, mental or property-wise, as a result of the alleged offenses.

Later, in the case of *United States v. Walker,* 176 F. 2d 564, which opinion has handed down by the Second Circuit on July 25, 1949, the defendant was convicted of transporting money in interstate commerce which had been taken feloniously by fraud. The gravamen of the charge was the obtaining of two large sums of money from a woman after the defendant had inveigled her into marrying him, even though he was already married to another. Actually, the defendant had previously defrauded two other women in the same manner of close to $50,000.00, marrying the first and then going through a form of marriage with the second. The testimony of the first woman, who was his legal wife according to the court's statement, as well as the second victim, was admitted upon the issue of defendant's fraudulent intent. The Court reversed his conviction because of the admission of the testimony of his lawful wife. At page 568, the question of privilege was discussed and it was stated, after citing the *Yoder, Paul* and *Bruner* cases, that "* * * the question is still open in point of authority." Then the Court admitted that "it is always a debatable question how far any relevant evidence should be privileged. It deprives the party against whom the privilege is invoked of access to the truth, and a disclosure of the whole truth should be the prime concern of a court of justice." However, the Court went on to take a

position in which he appears to be standing alone, particularly in view of the language of the Supreme Court in the *Funk* case at page 380:

> "Whether in a given situation the interest of the privileged party in suppressing the truth, ought to outweigh that concern would seem to be a matter for Congress and not for the courts."

The opinion reads on to propose a consideration which it is believed has been rejected by a majority of the courts and particularly by Judge Tolin in the case below. First, the Court stated with respect to the impact of the testimony of one spouse against the other, "although it is not very usual for it to arise unless the spouses are estranged, not all estrangements are final, and nothing could more dispose the privileged spouse to treasure enmity and to repulse any overture of reconciliation than the memory of what will ordinarily rankle as treachery." Secondly, it was stated the question of whether the marriage had been so far wrecked that there is nothing to save "will introduce a collateral inquiry likely to complicate the trial seriously." The Court goes on to state on the same page that "We do not forget that a wife from the earliest times was competent to testify against her husband when the crime was an offense against her person; and we have ourselves extended the exception to the crime of transporting her as a prostitute in interstate commerce, as has the Tenth Circuit. "* * * The basis of the exception has always been its 'necessity'; for it was argued that, when the wife was the victim, the prosecution must fail without her testimony. That is not true when her testimony is only corroboratory or confirmatory of an offense against another person, even though it was an offense of the same character as that

for which she herself has suffered. * * * But there is no reason to suppose that it could not have secured a conviction in the case at bar, had the *Walker* testimony been excluded."

The attention of this Court is particularly invited in the *Walker* case to the *dissent* of Circuit Judge Clark who wrote the earlier opinion of *United States v. Mitchell, infra,* 137 F. 2d 1006. In the opinion of this writer, it would be difficult to find a decision which has the forcefulness and impact of Judge Clark's dissent (which was reported in the opinion below by Judge Tolin). To facilitate a comparison of its language with the other cases cited herein, it is set forth almost entirely as follows:

> "Admittedly the common-law principle, that 'a wife cannot be produced either for or against her husband, *"quia sunt duae animae in carna una,"*' Co. Litt., f. 6b, 1628, is gone; indeed, there is none now so poor as to do it reverence. But I think we tend to overlook the fact that our duty to interpret 'the principles of the common law' in the light of 'reason and experience,' Federal Rules of Criminal Procedure, rule 26, compels us to discover anew a rational rule, and that a rule looking at least halfway toward the past is itself a new embodiment of the law without, however, the gain of being a real adjustment to modern life. In this instance, therefore, I prefer the forthright approach of a great American judge, McDermott, J., speaking for unanimous court in Yoder v. United States, 10 Cir., 80 F. 2d 665, and placing his decision by preference on this very point.
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> "For present purposes, however, the issue may be narrowed, as it is in the last paragraph of the opinion. For we really have to do with the exception,

recognized even at common law, of a wife's testimony as to her husband's crimes against herself. Since it is said quite properly that this exception 'probably extends' to the privileges against the admission of confidential communications, 8 Wigmore on Evidence, §2338, 3d Ed. 1940, I assume no special note need be taken of the defendant's letter of March, 1947, beyond the wife's testimony generally—even if the lack of exception to this bit of evidence is overlooked. And that this was a crime more against the wife's property than her person does not seem to be stressed and is not ground for a sound distinction. 8 Wigmore on Evidence, §2239, 3d Ed. 1940; A. L. I. Model Code of Evidence, Rule 216(c). Hence we find exclusion here limited to the single point that the wife was not the victim of the frauds for which the defendant was being tried. I submit that this is not a necessary deduction, or one grounded in 'reason and experience,' from that very vague and troublesome concept so criticized by Wigmore, *op. cit.* of 'necessity.' For no attempt is ever made actually to determine whether the wife's testimony is really necessary to the prosecution's (not her) case, as of course none can well be made. Often the testimony of the victim herself may not be absolutely necessary for conviction; on the other hand, testimony of successive defraudings of innocent women, as here, may be the very evidence to place the case beyond dispute. *Why should we not face it boldly that this vague label is but one of those judicial flourishes indulged in by judges to cover up a retreat from the impossible position to which Lord Coke's doctrine would otherwise have pushed them?*

"Should we not therefore turn to the only solid ground—if any—for the exclusion, namely, the promotion of marital peace, etc.? Wigmore, *op. cit.*

But then we must recognize that the reason for the exclusion is now gone entirely, put an end to by the husband's acts. And it will not be a difficult task, or a collateral excursion, for the judge to determine that fact, as did the judge here quite quickly. Certainly it is not any more difficult to conclude that the marriage is already wrecked in such case than in the one where the prosecutor contemplates making the wife his star witness and frames the indictment accordingly. There seems little difference between the situation where she shows herself ready to testify to the exact charge, and that where, as here, she is ready to support a Chinese copy of it. I think that the Judge's ruling below, made after careful hearing and argument, faced modern realities in the spirit invoked in Funk v. United States, 290 U. S. 371, 54 S. Ct. 212, 78 L. Ed 369, 93 A. R. R. 1136, and now embodied as a mandate in F. R. Cr. P. 26. I would affirm." (Emphasis added.)

Previously on July 26, 1943, the Court of Appeals for the Second Circuit considered this privilege. In *United States v. Mitchell,* 137 F. 2d 1006, the defendant was convicted of transporting his own wife in interstate commerce for the purpose of prostitution. Judge Clark who wrote the *Walker* dissent, *supra*, six years later, also handed down the opinion in this case. It was held that the lower court committed no error in the admission of the wife's testimony against the defendant. However, here the case was held to be directly within the "famous exception for necessity" recognized in *Lord Audley's* case, Hut. 115, 3 How. St. Tr. 401, where the husband had instigated rape against his wife. However, at pages 1007 and 1008, he stated as follows:

"In considering the admissibility of the wife's testimony, distinction must be made between a gen-

> eral privilege prohibiting testimony by one spouse against another and the special privilege as to confidential communications. The latter seems quite thoroughly recognized and approved in this country, 8 Wigmore on Evidence, 3d Ed. 1940, §§2332-2341, whereas the former, while also widely recognized except where modified by statutes or limited by exceptions, has been strongly criticized as of obscure origin, uncertain rationalization, and unfortunate results in limiting judicial search for the truth. Wigmore, *id.* §§2227-2245, especially §2228, quoting Jeremy Bentham's devastating blasts at the rule, and §2245, expressing the hope that 'before the centenary of Bentham's death, no vestige of the privilege will remain.' It is omitted from the American Law Institute's Model Code of Evidence, although the privilege for confidential communications is retained."

An excellent and extensive review of the privilege involved herein is contained in a case handed down six years later from the District Court in Michigan on November 8, 1949. In *United States v. Graham,* 87 F. Supp. 237, the situation was one where within a period of "thirty romantic days" the defendant by blandishment and fraudulent means inveigled the victim to marry him and give up to him thereafter her entire estate. The precise question was whether a wife may be permitted to testify against her husband in a criminal prosecution where a crime has been committed against her by felonious taking of her property. Although in this case the marriage to the witness wife was part of the scheme to defraud her of her property, where in the present case the original marriage was no doubt made in good faith and thereafter deserted by the husband, the language

is still persuasive in showing the development of the exception to cover a somewhat similar situation. The Court on page 239 quoted the pertinent provisions of Rule 26 of the Federal Rules of Criminal Procedure and also the basic compelling considerations for the preparation of the rules as follows:

> "The great objective of the criminal law is that justice be done. The guilty not to escape and the innocent must be in no danger of unjust conviction. In addition it is a tradition of Anglo-American jurisprudence that the defendant be fairly tried. The rules therefore must be drawn to safeguard the innocent, to facilitate the prosecution and speedy conviction of the guilty, without sacrificing fundamental principles of justice and fair play."

On page 240, the Court stated the question as follows:

> "With such a background how shall the common-law rule be applied in this case, where a wrong is committed by a husband against his wife's property? It may be more proper to ask, shall the existing exception to the rule be interpreted to make the testimony admissible, and if the answer is in the negative, shall the exception be enlarged to admit the testimony?
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> * * * * * * * *
>
> "The ancient legal doctrine of the identity of husband and wife has long become obsolete. Modern legislation and the realities of present day life have effectively destroyed what undoubtedly at best was but a legal fiction. In practically all states today a wife may own, manage and control her separate property and with few exceptions has had given to her by statute most of the contractual powers which she did not have under the common-law rule. * * *

Though the several states have not been uniform in the extent of their modifications of the common-law rules, in none of them today does a married woman remain entirely under the legal blackout created for her by the common law, * * *.

* * * * * * * *

"* * * in twenty states all restrictions as to competency have been removed, and in those states which continue to uphold exclusion, twenty-two of them provide for an exception in the case of 'a crime committed by one against the other.' Three of these make express provision for the testimony of spouses where a crime has been committed by one against the person *or property* of the other. In others the 'crime committed by one against the other' has been construed to include any crime, whether of violence to the person or one affecting the property of the injured spouse.

* * * * * * * *

"Shall a married woman be permitted to own, manage and control substantial property and be restricted in her right to protection against one who would wrongfully take it from her, on the sole ground that the law recognizes him as her husband? *Shall it be said that a husband is protected in the felonious taking of his wife's property by an ancient rule of the common law which permits her to testify against him only where her person is endangered or, as extended by judicial interpretation, where her morals are concerned? 'The light of the reason and experience' should resolve this question in the negative.* Wigmore on Evidence, Sec. 2239, Vol. 8, 3rd Ed.; American Law Institute, Model Code of Evidence, Rule 216c.

"Nor ought this view to be outweighed by a consideration of the basic reason for the common-law rule for the exclusion of the wife's testimony, namely, the preservation of domestic tranquility and happiness. We have here but the formalities of a marriage which was nothing but a mask and device to cover the fraud which the husband perpetrated upon his wife. When the defendant fraudulently obtained her property and then promptly deserted her, he destroyed the very basis for the rule *by his own actions,* and *the court should penetrate the fiction that there was any marital status to preserve."* (Emphasis added.)

It is with considerable interest that this writer noted a quotation from Wigmore in the next paragraph as follows:

"It is agreed by some legal writers that the rule prohibiting husband and wife from testifying against each other has long outlived its usefulness and that in the interests of justice, the court should be permitted to hear all of the evidence. Wigmore states it thus: 'This privilege has no longer any good reason for retention. In an age which has so far rationalized, depolarized and dechivalrized the marital relation and the spirit of Feminity as to be willing to enact complete legal and political equality and independence of men and women, this marital privilege is the merest anachronism, in legal theory, and an indefensible obstruction to truth, in practice.' 3rd Ed., Vol. 8, Sec. 2228, p. 232."

While this writer, in spite of her position as an active advocate, fervently hopes that the spirit of femininity has not (and will not ever be) completely de-chivalrized and we are perhaps only dealing here with what appears to

be an exception to the general rule of privilege, rather than a contention the rule itself should be abolished as a mere anachronism, the quotation exemplifies the advanced position some writers are willing to take.

In the *Graham* case, the Court concluded that even if an Appellate Court is loathe to accept the view that the privilege has long outlived its usefulness and prefers to sanction exceptions to the common law rule only "where exceptional circumstances are present" (citing the *Bruner* and *Walker* cases) there were such circumstances present in that case. At page 241, the Court held finally:

> "There are exceptional circumstances in this case. Without his wife's testimony, law and justice would be flouted by the defendant, and the safeguards sought to be established by the common-law rule would simply be translated into *a license* permitting him *to steal from or commit such other wrongs against her property as might suit his fancy.*" (Emphasis added.)

Subsequently on March 11, 1953, the Court of Appeals for the Fifth Circuit in *Pereira, et al. v. United States*, 202 F. 2d 830, decided a case similar in nature to the *Graham* matter, *supra*. The defendant had been found guilty of a violation of the mail fraud statute, a violation of the National Stolen Property Act and a conspiracy charge. The victim of the defendant's activities was a woman whom he married a few weeks after their first meeting. She was defrauded by him of a considerable amount of money and divorced him after the indictment was returned, but before trial of the case. Her testimony was admitted over objection of the defendant that she was not a competent witness on matters which transpired

during the marriage. The Court of Appeals affirmed and held at pages 834 and 835, the wife was a competent witness because of the fact that the marriage had been dissolved by a decree of divorce prior to trial. However, it was stated at page 835, "the evidence went to show that, insofar as the defendant Pereira was concerned, the marriage relation was merely a sham and a pretense dishonestly assumed as a means of perpetrating a fraud, and he will not be permitted to use the relation to close the lips of the victim and to shield himself from the truth." This case was affirmed by the Supreme Court at 347 U. S. 1.

This Court is also referred to the case of *United States v. Lutwak* decided on April 16, 1952, by the Court of Appeals for the Seventh Circuit. The three petitioners for a rehearing were convicted of conspiracy to defraud the United States in connection with the immigration laws by obtaining the illegal entry into this country of three aliens as spouses of honorably discharged veterans under the so-called War Brides Act. The three veterans traveled to Paris, went through marriage ceremonies with the three aliens and then accompanied their new spouses to the United States in order to secure entry for the latter. It was part of the plan that the marriages were to be in form only and for the purpose of enabling the aliens to secure entry. The parties did not live together and they thereafter took necessary legal steps to sever the legal ties. In denying the petition for a rehearing on April 16, 1952, the Court of Appeals held that the so-called wives were competent witnesses. On pages 756-761, the Court quoted extensively from the various perti-

nent decisions such as the *Funk* case and went on to state:

> "* * * The rules of evidence as defined in Rule 26, have shown an increasing tendency toward abolishment of incompetency in favor of admissibility, leaving the interest of the witness to the trier of the facts as bearing upon credibility. In other words, under the modern trend of thought in this country, the spouse, instead of being incompetent, is to be admitted as an interested witness, whose credibility is for the jury. This conclusion, we think, is the only one consistent with the reasoning of the Supreme Court in the decisions quoted and that of other courts. We conclude that, in view of the fact that Rule 26 of the Federal Rules of Criminal Procedure provides that the admissibility of evidence and the competence and privileges of witnesses shall be governed, in the absence of an Act of Congress, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience, and in view of the reasoning of the Supreme Court and other courts, we are justified in holding that, irrespective of all other questions, the wives were competent witnesses."

Of course, the facts in that case are similar to those in the *Graham* matter and the marriages apparently were not entered into in good faith by one or both of the parties. However, the Court still went out of its way to show the increasing trend of abolishment of incompetency in favor of admissibility, rather than basing the decision on the fact that the original marriages were for the purpose only of securing entry into this country and that a *prima facie* case of invalidity had been presented.

At page 761 the invalidity of the marriages was discussed but the holding was still on the former ground.

On February 9, 1953, at 344 U. S. 604, the Supreme Court affirmed the decision of the Court of Appeals. At page 613 over to page 615, the Court considered the questions as to whether or not the wives were competent to testify against their "purported" husbands. The Court stated at page 614:

> "Here again, we are not concerned with the validity or invalidity of these so-called marriages. We are concerned only with the application of a common-law principle of evidence to the circumstances of this case. In interpreting the common law in this instance, we are to determine whether 'in the light of reason and experience' we should interpret the common law so as to make these ostensible wives competent to testify against their ostensible husbands."

The Court here of course, was dealing with the situation at hand and had previously stated that if "the relationship was entered into with no intention of the parties to live together as husband and wife but only for the purpose of using the marriage ceremony in a scheme to defraud, the ostensible spouses are competent to testify against each other." However, the Court did make the above statement that it would not be concerned with the validity or invalidity of the so-called marriages, and went on to say on page 615:

> "The reason for the rule at common law disqualifying the wife is to protect the sanctity and tranquility of the marital relationship. It is hollow mockery for the petitioners in arguing for the policy of the rule to invoke the reason for the rule and to say to us 'the husband and wife have grown closer together as

> an emotional, social, and cultural unit' and to speak of 'the close emotional ties between husband and wife' and of 'the special protection society affords to the marriage relationship.' In a sham, phony, empty ceremony such as the parties went through in this case, *the reason for the rule disqualifying a spouse from giving testimony disappears, and with it the rule.* 'It has been said so often as to have become axiomatic that the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions.' *Funk v. United States, supra,* at 383. The light of reason and experience do not compel us to so interpret the common law as to disqualify these ostensible spouses from testifying in this case. We therefore hold that in the circumstances of this case, the common-law rule prohibiting antispousal testimony has no application. These ostensible wives were competent to testify."

Recently a case was handed down from the Fourth Circuit on March 7, 1955, entitled *Herman v. United States,* 220 F. 2d 219. There the defendant was convicted in the United States District Court of feloniously transporting in interstate commerce money and jewelry which he took from his elderly wife by fraud. This is a factual situation akin to the *Pereira* and *Graham* cases, *supra.* The marriage took place not long after the parties met and shortly before the swindle was consummated. In admitting the wife's testimony, the Court held at page 226:

> "The ancient and outworn rule of common law that spouses are incompetent to testify against each other except in cases of personal violence has been relaxed in the federal courts. * * * Moreover,

> it has been held in *United States v. Graham,* * * * a case precisely like that at bar, that a wife can be a witness against her husband not only when personal injury to her of a physical or moral nature is claimed, *but also where the crime affects her property.* We are in complete accord with this view which marks a normal development of the law of evidence and is in harmony with Rule 26 of the Federal Rules of Criminal Procedure, 18 U. S. C. A., * * *" (Emphasis added.)

We also feel that the law in California and the statutes on this subject are persuasive authority. This state has at least two sections dealing with this subject. California Code of Civil Procedure, Section 1881 places a limitation upon both husband and wife except it provides:

> "* * * nor to a criminal action or proceeding for a crime committed by one against the other * * *"

The Penal Code, Section 1322 likewise contains an exception and provides for the competency of either spouse to testify in the following language:

> "* * * or in case of criminal actions or proceedings for a crime committed by one against the person or property of the other, whether before or after marriage * * *"

There are several cases from this State which support the propositions announced by the above statute. See: *People v. Tidewell,* 141 P. 2d 969 (1943). It has been held in this State that on grand theft charge against a wife involving the drawing of checks on an alleged joint

tenancy bank account by the wife, that the husband is a competent witness to testify against such wife.

In the event this Court considers the privilege against disclosures of confidential communications between husband and wife involved in the within case, there follows a brief discussion of the Government's position in that regard. Originally, there had been little occasion for the judicial recognition of this privilege since the wider disqualification of the spouses of parties left very little possibility for the question of the former to arise. This was the reason the Court of Appeals in England denied there was any such common law privilege for marital communications. However, in the United States the courts have said that the statutes protecting marital communications from disclosure are declaratory of the common law.

Greenleaf in 1842 spoke only of "communications" and "conversations" when arguing for this privilege. Logically it appears that the privilege should be limited to expressions by words, oral, written or in sign language, or rarely, by expressive actions such as when a spouse would point out certain objects. A substantial number of courts such as the *Mitchell* case, *supra,* 137 F. 2d 1006, have held fast to this line of reasoning. Many courts, however, have construed various state statutes using the word "communications" to extend the privilege to actions and transactions not amounting to communications at all. This would seem to be unjustified, particularly in view of the existence of the general common law rule of incompetency of husband or wife testifying against the other.

At any event, the object of offering the testimony of Hazel R. Ryno was to prove a *lack* of communication with respect to authority to endorse and cash the check in question. Assuming the Court believes the general privilege should not be allowed at all or that this case involves an exception to the common law rule, then it is the Government's position that no part of her testimony would be barred by the privilege against disclosure of marital communications. The privilege originally was created to encourage marital confidences and here there was no communication at all involved. Further, the rule was that the communication must have been confidential which indicates that it was an overt act, not a lack of action, which was protected.

The privileges that attaches to confidential communications between husband and wife may be waived. The waiver belongs to the communicating spouse, the addressee of the communications not being entitled to object. (*Fraser v. United States,* 145 F. 2d 139 (6th Cir., 1954); Wigmore, Sec. 2340.) Assuming, *arguendo,* that lack of communication would come within this privilege, then Mrs. Kuna freely and voluntarily disclosed the situation on the stand and waived any such claim.

In *Holyoke v. Holyoke,* 87 Atl. 40, June 9, 1913, a case from the Supreme Judicial Court of Maine, an appeal from a probate decree was involved. The Court stated the basis for the general rule regarding confidential communications between husband and wife, "* * * *i. e.,* necessity to preserve the confidence which is essential to

the relationship of husband and wife. While there is some contrariety of opinion as to what constitutes a confidential communication, there is none as to the privilege when the confidence exists. 4 Wigmore on Evidence, §2336. But since the rule is based upon the necessity of preserving the confidence which must exist in order to create and maintain mutual happy relations and fulfill the * * * marriage, *we think it should not apply when the parties are living in separation* * * *" (Emphasis added.) See also: *McEntire v. McEntire,* 140 N. E. 328, May, 8, 1923.

Conclusion.

Briefly stated, the Government urges on the following grounds that the testimony of Hazel R. Ryno was properly admitted although she was at the time of trial the lawful wife of the defendant.

Even though the precise factual situation involved herein does not appear to have been discussed in the cases relating to the claim of privilege, the modern rule followed by the majority of the courts, including the Supreme Court of the United States, has been to remove the barrier of incompetency from a husband or wife testifying against the other, rather than to exclude such testimony. The trend toward this rule has developed gradually for over a hundred years and by its application all of the relevant evidence is before the trier of facts so that in the interests of justice the whole truth can be ascertained.

Some courts have been unwilling to accept a complete abolishment of the privilege but prefer to sanction the exception to the rule where "exceptional circumstances" are present. It appears to be generally accepted that this occurs where the offense is a crime against the person *or property* of the spouses or where there is no longer any marital peace to promote.

In connection with the former, as will be shown in subsection (c) herein, the wife had a definite property interest in the check under the mandate of Congress.

With respect to the latter, as Judge Tolin stated in the decision below:

> "When a man so far abandons the obligations of marriage as to leave his wife and enter into a long term adulterous relationship with another, even habitually holding out the paramour as his wife, it would be unrealistic for a court to say that to permit the wife to testify in a criminal case against him would wreck the marriage and should not be permitted. By abandonment of the marital duties and privileges, such a husband has also abandoned any right to assert a privilege to have his wife barred from giving testimony in a prosecution against him."

B. Lack of Authority Was Established by the Government Independently of the Testimony of the Defendant's Wife.

The Supreme Court of the United States in *Opper v. United States,* 348 U. S. 84, recently considered on December 6, 1954, the extent of corroboration of admissions necessary as a matter of law for a judgment of conviction. The Court held:

> "* * * the better rule to be that the corroborative evidence may not be sufficient independent of the statements, to establish the *corpus delicti.* It is necessary, therefore, to require the Government to introduce independent evidence *which would tend to establish the trustworthiness of the statement.* * * * It is sufficient if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth." (Emphasis added.)

Subsequently, on March 7, 1955, the Fourth Circuit in *Herman v. United States, supra,* 220 F. 2d 219, held as follows:

> "Admissions may be used if there are corroborating circumstances which fortify the truth of the confession, although independently they do not establish the *corpus delicti* either beyond a reasonable doubt or by a preponderance of proof."

Government's Exhibit No. 22 received in evidence [Rep. Tr. p. 182] was a written statement voluntarily executed by the defendant in the presence of a Secret Service Agent. [Rep. Tr. pp. 98-99.] In it the defendant admitted that he had "forged" the endorsement of his wife as the payee of the check in question. The witness had explained to the defendant that the word

"forgery" meant signing his wife's name to the check without permission. [Rep. Tr. p. 101.] Thus the defendant knew before he signed the statement that the word "forgery" therein included the element of lack of authorities from the payee. Therefore, we have the defendant's written admission that he had no authority from his wife to endorse her name. Further, the testimony was that the defendant specifically stated orally to the Agent that it was done "without her permission." [Rep. Tr. p. 101.]

According to the *Opper* and *Herman* cases if there is sufficient independent evidence aside from the admissions which *tends* to establish the *trustworthiness* of the statement, a judgment of conviction should be affirmed. This independent evidence does not have to establish the *corpus delicti* itself as contended by counsel for appellant.

It is felt that the following evidence is sufficient to fulfill the requirements of the above cases. Sergeant Herlihy first saw the defendant at the Allotment Division of the Air Force Finance Center in Victorville, California, on October 21, 1954 [Rep. Tr. p. 39] and showed him Exhibit 15, asking him to read it. It was a telegram referring to the confusion which had resulted over allotment checks for his lawful wife, Hazel R. Ryno [Rep. Tr. p. 44] and the defendant was asked by the Sergeant to come back as soon as possible with his wife to clear up the matter. The defendant did return to the base a few days later with a woman [Rep. Tr. p. 88] at a time when Ellen Wilcox was living with him [Rep. Tr. p. 136] and she was introduced to the Sergeant by the defendant as Hazel R. Ryno, his wife. [Rep. Tr. p. 45.] This woman was not Hazel R. Ryno, who testi-

fied at the trial. [Rep. Tr. pp. 84-86.] Sergeant Herlihy asked them for a copy of their marriage license and they stated it was not available then but that they would get it later for him. [Rep. Tr. p. 88.]

Ellen Wilcox testified that she had lived with the defendant since 1951, first in Denver, Colorado, before he went overseas. [Rep. Tr. pp. 127-128.] The defendant came back to Denver and they continued to live together for one month before he left for Victorville. [Rep. Tr. pp. 131-132.] She joined him at Victorville shortly thereafter and lived with him from February to November of 1954. [Rep. Tr. p. 136.] The defendant represented her to be his wife to friends [Rep. Tr. pp. 143-144] and she went by the name of Mrs. Ryno. [Rep. Tr. p. 147.] The defendant is the father of her two small children and she knew the defendant was married to Hazel R. Ryno. [Rep. Tr. p. 132.]

Obviously, when Sergeant Herlihy requested the defendant to come right back to straighten out the difficulties with the allotment checks, the latter tried to deceive him into believing his paramour was the lawful recipient. Can we say that this was the action of a person with authority to sign the name of the real payee, Hazel R. Ryno? All of the previously mentioned evidence definitely tends to establish the trustworthiness of the confession that he endorsed the check without her permission. Further, Exhibit No. 6 is a letter dated January 17, 1954, purporting to have been sent by the real Hazel R. Ryno from Denver, Colorado, to the Allotment Division for the Air Force in that city. [Rep. Tr. pp. 16-17.] It requested that in the future the checks for Hazel R. Ryno be sent to the Air Force Base at Victorville, Cali-

fornia, the defendant's address. The handwriting expert testified that the letter was in the defendant's handwriting. [Rep. Tr. pp. 106-109.] Taking into consideration the facts that the defendant was living with another woman in Victorville, and further, that he wrote a letter himself from that town, purporting to be not from him but from Hazel R. Ryno, attempting to get the checks transferred to his own address, it is felt that the requirements of the *Opper* and the *Herman* cases have been met. The above is also borne out by the fact that the business records for the Allotment Division in Denver, Colorado, Exhibit 4 [Rep. Tr. pp. 160, 14-15] showed a call was received in Denver on February 12, 1954, from Mrs. Ryno requesting information as to her January check since she had not received it. Pursuant to that call a change of address was made back to Denver, Colorado, Exhibit 8. [Rep. Tr. p. 19.] They were all government records admissible to show the truth of the occurrence to which they related.

Is it reasonable to assume that Mrs. Ryno in Denver, Colorado, would ask that her check be sent to Victorville when her husband was living there with another woman by whom he had had two children and then immediately ask that the checks be sent again back to Colorado? The resultant confusion of the defendant's efforts to have all of the checks sent to him and the real Mrs. Ryno's contacts with Colonel Miller's office attempting to have the checks redirected to her home show that something was amiss. As stated above, it is submitted that there is substantial independent evidence tending to support the truthfulness of the admissions made by the defendant.

C. Defendant Did Not Have Authority by "Operation of Law" to Endorse the Check in Question and Is Therefore Guilty of a Criminal Offense.

In Volume 37 of Corpus Juris Secundum, page 34, Section 3, the elements of forgery are set forth as follows:

> "Subject to statutory variations, to constitute the crime of forgery, it is essential that three things should exist: (1) There must be a false making or other alteration of some instrument in writing, discussed, *infra,* section 5. (2) There must be a fraudulent intent, discussed, *infra,* section 4. (3) The instrument must be apparently capable of effecting a fraud, discussed *infra*, Section 14. Both the fraudulent intent and making must combine to complete the offense."

On page 35, Section 4, it is further stated:

> "The intent to defraud is not limited to obtaining money or property; it is sufficient if the forged instrument is to the prejudice of the *rights* of some person." (Emphasis added.)

In *Quick Service Box Co., Inc. v. St. Paul Mercury Indemnity Co. of St. Paul*, 95 F. 2d 15, 7th Cir., February 16, 1938, the Court concluded on page 16 as follows:

> "(2) We understand forgery to include the making or altering, with intent to defraud, of any writing or printing so as to cause the alteration or execution purport to be the valid act of a person, which it is not. Within its terms are the fraudulent making of words purporting to be what they are not *to the prejudice of others' rights*—the false making of material alteration, with intent to defraud, of any

writing which, if genuine, would be of legal efficacy *or* the foundation of legal liability." (Emphasis added.)

It is clear that an *interference with the rights of others* is sufficient to support a charge of forgery. The Government further contends that this is true even where the other person is the spouse of the defendant. Further, we have not been able to find any case where it is held that the payee of a check must have a complete and unequivocal right to the proceeds thereof before a forgery of his or her name can be accomplished. The language used in defining forgery in all of the cases indicates to the contrary.

In this case the allotment check which is set forth in the indictment was issued under the provisions of Public Law 771, 81st Congress (see Title 50, App., Secs. 2201-2216, and Title 36, Sec. 231, *et seq.*) and regulations issued by the Secretary of the Air Force thereunder. The Act opens with the statement:

> "To provide allowances *for dependents* of enlisted members of the uniformed services * * *." (Emphasis added.)

Section 2204 pertains particularly to "Quarters, Allowances and Allotments of Pay." It states in part:

> "(h) The payment of the basic allowance for quarters provided in subsection (f) of this section for enlisted members with dependents shall be made only for such period as the enlisted member has in effect an allotment of pay not less than the sum of the basic allowance for quarters to which he is entitled plus $40 (or in the case of enlisted members in pay grades E-4 and E-5, $60; or in the case

of enlisted members in pay grades E-6 and E-7, $80), for the support of the dependent or dependents on whose account the allowance is claimed."

Section 2206 further sets forth the following provision:

"§2206. Allowance and Allotment Without Consent of Enlisted Member.

"The Secretary concerned may, at his discretion, with or without the consent of the enlisted member concerned, authorize and direct the payment of the basic allowance for quarters and the establishment and payment of such allotment or allotments as he shall determine to be in conformity with the provisions of this Act (Sections 2201-2216 of this Appendix) for any enlisted member with dependents in any case in which such member does not claim such allowance. Sept. 8, 1950, c. 922, §6, 64 Stat. 796."

The Air Force in accordance with the provisions of the United States Code published an Air Force Manual, 173-20, Chapter 5, of which deals with Class "Q" allotments. As stated previously this portion of the manual was received in evidence as Government's Exhibit No. 23.

In Section II, Subparagraph 20515, it is provided that:

"The allotment will be payable *to* the dependent on whose behalf the basic allowance for quarters is claimed." (Emphasis added.)

In Section IV, Subparagraph 20532, it is provided:

"a. *To Whom Payable.* The allottee and the amount payable will be designated on DD Form 234. A class Q allotment must be made payable to or on behalf of a dependent or dependents listed

on the dependency certificate (DD Form 137, 137-1, or 137-2) and because of whose dependency the member will be entitled to increased basic allowance for quarters for dependents. Separate allotments will be made on behalf of each of the following categories of dependents, but generally will not be made for each of the dependents in the same category; Wife and/or children; child or children in custody of a divorced wife or other custodian; parent or parents."

The very purpose of the Act was to get this money, part of which was a credit from the Government under subparagraph 20501 of Section I known as a "basic allowance for quarters for dependents" and part of which was a deduction from the Airman's pay, into the hands of the dependents. This was no doubt a necessity based upon the propensity of many servicemen to inadequately support dependents. A diversion of such funds would certainly be prejudicial to the rights of dependents. It is clear that receipt of Class Q allotment checks was the *right* of the dependent since the allotment could be initiated on the request of a dependent even over the protest of the Airman. See subparagraph 20551 of Section V. The Airman can only stop the allotment on the death of the dependent, if a divorce has been attained or separation from service occurs. (See subparagraphs 20535 and 20536.)

Even if the defendant's contention with respect to separate property could be sustained, which we do not believe is true, the Airman waived any right to these funds by voluntarily executing the application and authorizing the allotment to commence for his legal wife.

As Judge Tolin held in the decision below:

> "The particular check was issued by the Government for a special purpose. It was never the purpose of a serviceman's allotment that he be thereby personally enriched. It was the purpose of the Government to provide currently for the regularly recurring subsistence needs of the serviceman's family. When defendant intercepted the check which was payable to his wife, and signed her name as endorser without her authority and for the purpose of receiving the funds for his personal use, he thereby acted fraudulently toward the Government and the wife, as well as all persons through whose hands the check would pass, and he committed the crimes charged in the Indictment."

The above holding was supported by the case of *Wissner v. Wissner,* 338 U. S. 665, where the wife of a deceased serviceman sued to recover national life insurance benefits. The enlisted man subscribed to the policy while married to her and she was originally named beneficiary. However, due to an estrangement, he later named his mother and father as beneficiaries without her knowledge and consent. The lower State Court found that decedent's army pay was community property under California law, was the source of premiums paid under the policy and directed judgment for the wife for one-half of the amounts of the payments. The Supreme Court of the United States held that the lower court's decision was incorrect. In spite of state law governing wages acquired during the marriage relationship the Supreme Court held *that the controlling section was the one pro-*

mulgated by Congress involving the designation of beneficiary. It was stated at page 658:

> "Thus Congress has spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other. Pursuant to Congressional command, the Government contracted to pay the insurance to the insured's choice. He chose his mother. It is plain to us that the judgment of the lower court, as to one-half of the proceeds, substitutes the widow for the mother, who is the beneficiary Congress directed would receive the money."

Of course the selection of a beneficiary for insurance is a different proposition from the designation of a beneficiary for support allowance and, as stated above, the latter can be started on the instigation of a dependent without the consent of an enlisted man. However, the *Wissner* case holds that, since Congress has spoken, its mandate could not be frustrated by the state community property law. The *Wissner* case went on to say:

> "The end is a legitimate one within the Congressional powers over national defense, and *the means are adapted to the chosen end.*"

Here the chosen end was that the dependents, particularly wives and children, would receive support during the term of service and the means to insure that attainment under the code and the supplemental regulations were calculated to deposit checks in the hands of the dependents. There was no intent that the serviceman was to be "personally enriched" in any way and the system set up to distribute the allotments was designed

to protect the intended recipients of the funds primarily by having them named as payees in the check.

Since the allotment was issued for a special purpose, was to be payable to the dependent who could initiate its issuance even over the inaction of the serviceman, a dependent clearly had the right to the allotment check.

Thus, it is submitted that the defendant was not dealing rightfully with his own property as contended in appellant's opening brief.

Conclusion.

It is respectfully submitted to this Honorable Court that the Government for the above reasons has proved all of the elements of the offenses charged in the indictment and that the judgment of the District Court should be affirmed.

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